

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENT D. ALLEN)	
Claimant)	
)	
VS.)	
)	
L.G. EVERIST, INC.)	
Respondent)	Docket Nos. 1,022,426 &
)	1,022,427
AND)	
)	
WAUSAU INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the January 9, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that claimant injured his right and left knees arising out of and in the course of his employment. He found, however, that there was not sufficient evidence to conclude that claimant is temporarily totally disabled and denied his request for temporary total disability benefits. The ALJ also noted that his Order of July 12, 2005, ordering respondent to provide claimant with an authorized physician to evaluate and treat claimant's injuries to the right and left knees had not been changed. He stated that if respondent had new evidence concerning the issue of causation, it had the right to request a preliminary hearing on the issue. The ALJ stated that respondent instead simply chose not to provide the services of a physician. He found that in this situation, claimant may seek medical treatment from a physician of claimant's choice and the expenses of that treatment shall be paid by the respondent as authorized medical treatment. The ALJ further held that claimant's remedy was not a post-award medical hearing under K.S.A. 44-510k but, rather, is contained in K.S.A. 44-510j. Accordingly, the ALJ found that the hearing held January 9, 2006, was a preliminary hearing, not a post-award medical hearing, and denied claimant's request for attorney fees.

Claimant argues that the ALJ erred in denying him temporary total disability benefits because he has been unable to obtain employment and will be unable to work until his

medical condition improves. Claimant also contends the ALJ erred in denying assessment of attorney fees for the hearing held January 9, 2006.

Respondent and its insurance carrier (respondent) state that the ALJ properly denied claimant's request for temporary total disability benefits. Respondent also agrees that K.S.A. 44-510k is not an appropriate remedy in this situation and that the ALJ was correct to deny claimant attorney fees. Accordingly, respondent requests that the ALJ's Order of January 9, 2006, be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date, the Board finds that the ALJ's denial of attorney fees should be affirmed, but on an appeal from a preliminary hearing order, the Board is without jurisdiction to address the issue concerning the denial of temporary total disability compensation.

These cases first came before the ALJ for a preliminary hearing on July 11, 2005. At that time, claimant requested medical treatment for alleged work-related injuries to both his knees and payment of unauthorized medical expense. Respondent argued that claimant did not injure his knees out of and in the course of his employment and contended that claimant did not give timely notice of either claim. In an Order dated July 12, 2005, the ALJ found that claimant injured his knees out of and in the course of his employment on September 7, 2004, and October 5, 2004, and that respondent had timely notice of both claims. The ALJ ordered respondent to designate to claimant an authorized physician "to evaluate and treat, if necessary, the claimant's injuries to the right and left knees."¹

As a result of the July 12, 2005 Order, respondent authorized Dr. Roger Hood, an orthopedic surgeon to evaluate and treat claimant. Dr. Hood saw claimant on August 25, 2005, and reported back to respondent that in his opinion, neither of claimant's knee complaints were related to his work-related injuries, which he stated were trivial. After review of claimant's medical records, including operative and office notes from the doctor who performed arthroscopic surgery on claimant's left knee, Dr. Hood stated:

His new injury to his left knee when he had the bruising on the medial side sometime after surgery could represent some additional derangement there and a new MRI to sort that out would be indicated, however, it seems to me that all of these knee problems are unrelated to his alleged work injuries in all likelihood.²

¹ALJ Order (July 12, 2005) at 2.

²P.H./Post-Award Hearing Trans. (Jan. 9, 2006), Cl. Ex. 1 at 2.

The MRI mentioned above was not provided. Claimant filed an Application for Post Award Medical on November 22, 2005, requesting authorization for an MRI as recommended by Dr. Hood. Claimant also filed an Application for Preliminary Hearing on December 2, 2005, with a seven-day demand letter advising that he wanted the MRI recommended by Dr. Hood. The demand letter also requested benefits due, including but not limited to "temporary total disability compensation, medical treatment, reimbursement of unauthorized medical if applicable and/or vocational rehabilitation."³

Respondent contended that Dr. Hood did not believe claimant's current knee condition was a result of his work-related accidents. Respondent also argued that Dr. Hood's report was ambiguous and that respondent should be able to clear up this ambiguity before being ordered to provide treatment to claimant. Dr. Hood's deposition was scheduled by respondent in order to find out if the recommended MRI was related to claimant's work-related accidents or to claimant's preexisting condition. Respondent indicated that if Dr. Hood testified that the MRI was related to claimant's work-related injuries, it would authorize that test. This deposition was scheduled for February 7, 2006, and a copy of the transcript of the deposition is attached to respondent's brief to the Board. However, the Board will not consider that deposition testimony, as it was not part of the record presented to the ALJ.⁴ The ALJ, in his Order of January 10, 2006, stated that if respondent had new evidence on the issue of causation of claimant's condition, it could have requested a preliminary hearing. The ALJ further found that respondent remained liable for claimant's medical treatment by virtue of the January 12, 2005 Order until the order is changed by further order of the court.

Claimant argued that since Dr. Hood did not treat his condition and respondent did not authorize the MRI, his only recourse was to file an Application for Post-Award Hearing. He also argues that he is entitled to attorney fees as provided for in K.S.A. 44-510k. The ALJ disagreed, stating that K.S.A. 44-510k is intended for cases that have either been settled or an award has been issued pursuant to the procedures of K.S.A. 44-523. The ALJ found that the January 9, 2006 proceeding was more properly considered a preliminary hearing than a post-award medical hearing and held that attorney fees were not appropriate. The ALJ stated that claimant's remedy in this situation could be found in K.S.A. 44-510j(h), where claimant, when not treated by Dr. Hood, would have been allowed to seek medical treatment for his knee injuries from a physician of his choice and that respondent would have been required to pay the expenses of that treatment. The Board agrees that this is not a post award proceeding and, therefore, attorney fees are not awardable under K.S.A. 44-510k, nor under K.S.A. 44-536(g). Rather, claimant's remedy

³Letter dated November 23, 2005, attached to Application for Preliminary Hearing, Form K-WC E-3 (filed Dec. 2, 2005).

⁴K.S.A. 44-555c(a).

is to obtain the treatment from a physician of his choice or from the previously ordered physician and then, if payment is refused, seek an order from the ALJ for payment of the medical bills and penalties under K.S.A. 44-512a. Consideration could also be given to making a complaint to the fraud and abuse unit under K.S.A. 44-5,120.

Claimant also argues that the ALJ erred in denying temporary total disability benefits. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁵ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁶

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing, and the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁸ Accordingly, claimant's appeal is dismissed as to the issue of temporary total disability benefits.

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

⁵K.S.A. 2005 Supp. 44-551.

⁶*Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁷*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁸*See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, the Order of Administrative Law Judge Kenneth J. Hursh dated January 10, 2006, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Bruce L. Wendel, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director